



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

DEC 15 2009

Colonel Keith A. Landry
U.S. Army Corps of Engineers
Louisville District
Attn: Ms. Lee Anne Devine
600 Dr. Martin Luther King, Jr. Place
Louisville, Kentucky 40202

Subject: NWP # 21, LRL 2008000139, Apex Energy – Carver Fork (KDNR 898-0646)

Dear Colonel Landry:

Pursuant to the June 11, 2009, Memo to the Field on Enhanced Surface Coal Mining Pending Permit Coordination Procedures, the above referenced permit is one that fell under the enhanced coordination process (ECP). On Friday, October 16, 2009, the U.S. Army Corps of Engineers, Louisville District (Corps) notified the U.S. Environmental Protection Agency Region 4 (EPA) that it had initiated the formal ECP process for this permit. This notification signaled EPA that the Corps believed the permit was at a point it could be issued and started the 60 day review by EPA. EPA is requesting the 15 day extension to the formal coordination process due to unresolved issues. This would extend the formal coordination period to December 30, 2009.

EPA contacted the Corps, Apex Energy (Applicant), and the applicant's consultant immediately following the formal notification. EPA shared numerous emails and made several phone calls outlining our issues and concerns. EPA also requested a copy of the draft permit and draft record of decision. Although the ECP encourages the sharing of information both before and during the 60 day coordination timeline to ensure a timely response, the Corps' position is that this request could only be made 10 days (December 5) prior to the end of the 60 day ECP period (December 15), pursuant to the ECP language. Earlier sharing of this type of information would greatly enhance the prospect for resolution.

EPA scheduled and held a site visit on November 12, 2009, and a meeting on December 10, 2009, with the Applicant, their consultant, and the Corps. EPA's concerns were again discussed at this meeting. EPA's concerns were:

- Avoidance and minimization to potentially reduce the impacts of the two proposed hollow fills;
- Water quality (Warm Water Fishery designated use and the numeric and narrative criteria necessary to protect this use from elevated conductivity, TDS, and numerous metals), and to consider ways to address potential water quality standards violations;

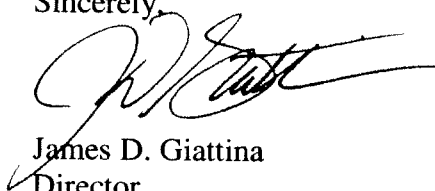
- Cumulative impacts considering the number and adjoining permitted mines; and
- Compensatory mitigation of unavoidable impacts and the adequacy of the applicant's proposal to meeting mitigation requirements under present guidance and directives of our respective agencies.

These concerns and possible solutions were discussed at the meeting in Pikeville, Kentucky between the Applicant, the applicant's consultant, the Corps, and EPA. The Applicant and their consultant verbally provided an explanation why the fill had to be placed where it was proposed. The need to avoid impacts to county roads which are adjacent to the site limit the consideration of placing fill on adjacent mines and thus, eliminated the potential use of these disposal sites. Also, the Corps has reviewed the fills and determined that the applicant has complied with the recently developed minimization procedures jointly developed by the Corps, the Office of Surface Mining, the State and industry. EPA now believes the avoidance and minimization issue and concerns have been adequately addressed.

EPA believes its remaining issues which include the potential for water quality impacts and compensatory mitigation can be addressed by modifications to the proposal and the addition of special conditions required as part of the final permit. Draft special conditions EPA discussed at last week's meeting and that have been used on other Clean Water Act Section 404 surface coal mining permits issued in Appalachia are being developed and will be provided to the Corps with the next 15 days.

This letter activates the 15 day extension allowed under the ECP. On or before December 30, 2009, EPA will identify for the Corps those special conditions that we believe are needed to address our remaining concerns. Under the ECP, within 10 days of the close of this extended coordination period the Corps must provide EPA a written notification of its decision to issue the permit and provide details on how the District is responding to the concerns raised by EPA. EPA will determine following receipt of your response if the response adequately addresses our concerns. If our other issues remain unresolved as of January 11, 2009, EPA will make its final decision on whether to initiate the 404(c) process or allow the permit to move forward by January 21, 2009. We look forward to hearing from you. If you have any questions regarding our comments, please contact me, or have your staff contact Tom Welborn at (404) 562-9354 or Duncan Powell at (404) 562-9258.

Sincerely,



James D. Giattina

Director

Water Protection Division

cc: Philip Elswick, Summit Engineering
Corps, Sassafra Field Office